SEP 19 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of The United States

No. 352 October Term, 1955

MILWAUKEE & SUBURBAN TRANSPORT CORPORATION, a Wisconsin Public Service Corporation,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Appellee,

CITY OF MILWAUKEE AND MILWAUKEE BOARD OF SCHOOL DIRECTORS,

Intervening Appellees.

APPEAL FROM SUPREME COURT OF WISCONSIN

MOTION TO DISMISS

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THE GILMAN PRESS, MADISON, WISCONSIN

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APPEAL FROM SUPREME COURT OF WISCONSIN

MOTION TO DISMISS

Appellee Public Service Commission of Wisconsin,[1] pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal herein be dismissed on grounds (1) because it does not present a substantial federal question, and (2) because appeal is not proper in this case in that appellant should have filed a petition for certiorari, and no ground exists for granting certiorari.

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[1]The City of Milwaukee and Milwaukee Board of School Directors, intervening appellees join in this motion to dismiss. See page 18 *post.*

QUESTION PRESENTED

Where an order of the appellee, Public Service Commission of Wisconsin, under review (later superseded by a subsequent order authorizing higher fares) authorizes a common carrier of passengers to charge fares that will enable it to pay all expenses of operation, including a provision for annual depreciation (which depreciation allowance will over the service life of the property enable the carrier to recover the full amount of *its* actual dollar investment) plus a return which equals the amount necessary to pay interest on all borrowed money, dividends on all preferred stock, and about 50 per cent on common stock, which return allowance produces a return of 7.35 per cent when related to a rate base representing the actual dollar investment of said carrier, is the end result confiscatory, so as to take property of said carrier without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution?

JURISDICTION

The appellant seeks to review the final judgment of the Supreme Court of Wisconsin affirming a September 17, 1953 fare order of the Public Service Commission of Wisconsin under review here (R. 102-122), by appeal under 28 U. S. C. § 1257(2). We submit appeal is not proper and that appellant should have filed a petition for certiorari.

As held by the state Supreme Court and conceded by appellant (Jurisdictional Statement p. 3) the statutes under which the Public Service Commission proceeded required it to establish fares that are "just and reasonable."[2] Wisconsin Statutes, Sections 194.19, 193.01(1), 195.02(1), 195.08(1) and 195.05(1). *The appellant does not challenge the constitutionality of these statutes.* Rather, the claim of appellant reduces itself to the proposition that the fare order issued by the Public Service Commission which it designed to meet the statutory standard of a "just and reasonable" rate, has the effect of being confiscatory and hence deprives it of property without due process of law, contrary to the Fourteenth Amendment. Thus the attack is not against the statutes involved, but is against an alleged unconstitutional exercise of authority under statutes which are valid. Hence, we submit appeal is not proper and the appellant should have applied for certiorari. 28 U. S. C. § 1257(3); *Jett Bros. Distilling Co. v. Carrollton,* 252 U. S. 1, 6; *Zucht v. King,* 260 U. S. 174, 177; *Charleston Federal Savings & Loan Assn. v. Alderson,*

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[2]This is the same statutory standard as was involved in *Federal Power Comm. v. Hope Natural Gas Co.,* 320 U. S. 591.

324 U. S. 182, 187. The instant application should, therefore, be regarded and acted upon as a petition for a writ of certiorari. 28 U. S. C. § 2103.

STATEMENT

On December 30, 1952 appellant Milwaukee & Suburban Transport Company (Suburban) bought the mass transportation system in Milwaukee from its then owner, The Milwaukee Electric Railway & Transport Company (T. M. E. R. & T. Co.), for $10,000,000 of which $8,966,315.89 was for operating properties and $1,033,684.11 for other assets. R. 137.

In a separate proceeding (2-SB-510) the Public Service Commission of Wisconsin authorized Suburban to issue securities needed to obtain cash to make such purchase, as required by Chapter 184, Wis. Stats., by order issued December 15, 1952. R. 122-136. A supplemental order prescribing accounting entries was issued May 19, 1953. R. 136-141. The Commission found *inter alia* (1) the transportation property and other assets had a value of $10,000,000 (R. 133), which sum was equal to the purchase price paid, of which $8,966,315.89 was for the operating property and $1,033,684.11 for other assets (R. 137); (2) that the depreciated investment in the transportation property involved by T. M. E. R. & T. Co., the original owner, was $13,872,028.26, said figure being the original cost to T. M. E. R. & T. Co. of $29,926,800.04 less depreciation reserve requirement of $16,054,771.78; (3) the cost of said property to Suburban was $8,966,315.89. The difference between said figure of $13,872,028.26 (net cost of T. M. E. R.

& T. Co.) and $8,966,315.89 (net cost of Suburban) is $4,905,712.37. Thus Suburban purchased said transportation property for $4,905,712.37 less than the net investment of T. M. E. R. & T. Co. therein.[3]

To record the transaction on its books the Commission on May 19, 1953 ordered[4] Suburban, *inter alia*, to credit an account entitled "Plant Acquisition Adjustments" with the sum of $4,905,712.37 (which is a red figure), which amount would be amortized over a period of 15 years by credits amounting to $327,047 annually to an account entitled "Amortization of Plant Acquisition Adjustment" and which item would be included as a red figure in operating expenses immediately following depreciation expense. R. 140-141. Inasmuch as depreciation expense was ordered to be based on the original cost of the property to T. M.

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[3]T. M. E. R. & T. Co. was a fully-owned subsidiary of Wisconsin Electric Power Company. The latter was of the view that the Securities and Exchange Commission, acting under the Public Utility Holding Company Act, would require it to divest itself of non-utility properties requiring that it sell its T. M. E. R. & T. Co. stock or physical assets. Wisconsin Electric Power Company chose to sell the physical assets of T. M. E. R. & T. Co. because of federal income tax savings realized. The sale of the T. M. E. R. & T. Co. transportation system to Suburban for $10,000,000 resulted in a tax saving of about $4,500,000 to T. M. E. R. & T. Co. and Wisconsin Electric Power Company. R. 125, 126, 172-173.

[4]This was in the separate proceeding in 2-SB-510. No attempt was made to review this order.

E. R. & T. Co. at specified rates (R. 141), the net effect of such procedure was, as stated by the Supreme Court of Wisconsin, to base depreciation as an operating expense for Suburban upon the dollars paid by Suburban for the transportation property ($8,966,315.89) instead of the $13,-872,028.26 representing the net investment of the prior owner, T. M. E. R. & T. Co.

On May 1, 1953 Suburban filed an application for a fare increase. On September 17, 1953 the Public Service Commission of Wisconsin issued the fare order *here under review*. R. 102-122. The Commission authorized fares designed to produce revenues sufficient to cover all costs of operation, including depreciation expense sufficient over the service life of the property to restore to Suburban the number of dollars *it* had invested in the property; and a return of 7.35 per cent related to a rate base formulated on the actual dollars Suburban had invested in the property. R. 115-116.

The amount allowed for depreciation expense was computed in accord with the accounting order previously referred to prescribing the accounting entries on sale of the property by T. M. E. R. & T. Co. to Suburban.

Specifically the annual depreciation charge on the original cost of the property to T. M. E. R. & T. Co., the former owner, was $1,196,915. The inclusion of the red figure of $327,047 (being the annual amount needed to amortize the red Acquisition Adjustment account item of $4,905,-712.37) immediately following depreciation expense has the effect of reducing the amount of annual depreciation expense allowable to Suburban to $869,868 (R. 120), which is the amount allowed by the Commission to Suburban for

this item as part of its cost of service. This annual amount allowed for depreciation will *concededly* return to Suburban over the service life of the properties the number of dollars it has invested in the property.

All contentions of appellant Suburban revolve around its claim that it is entitled to have depreciation computed, not on the number of dollars it has invested in the property ($8,966,315.89), but on the $13,872,028.26 representing the net investment of T. M. E. R. & T. Co. Speaking in terms of dollars, Suburban contends it is entitled by way of annual depreciation expense to $327,047 more than the $869,-868 the Commission allowed it.

On February 18, 1954 Suburban filed a new application for a fare increase. Before the proceedings were terminated it filed an application for temporary higher rates, which was granted by order issued May 13, 1954. On and after May 24, 1954 the new and higher level of fares was put into effect, *superseding the fares authorized by the order of September 17, 1953 here under review.* R. 181-186. On November 5, 1954 a final order was issued (R. 186-198) which made permanent fare increases authorized by the May 13, 1954 order and authorized certain other increases. The higher fares thus authorized are those currently in effect.

ARGUMENT

I.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

(1) *The fare order under review allows Suburban annual depreciation expense and also a return of 7.35 per cent both being based on the number of dollars actually invested by it.*

The fare order under review authorizes Suburban to charge fares designed to produce revenues which will pay *all* of the cost incurred by it in furnishing service to the public. Included is an allowance of $869,868 for depreciation expense which over the service life of the property will produce enough dollars to equal the actual dollar investment of Suburban in the business, and for an annual return of $768,000 equalling the amount necessary to pay interest on all borrowed money, dividends on all preferred stock and abount 50 per cent on common stock, which produces a return of 7.35 per cent when related to a rate base representing the actual dollar investment of Suburban in the enterprise. R. 115-116. We submit the Supreme Court of Wisconsin correctly said:

> "* * * From the standpoint of both logic and equity we can perceive no good reason why fares, which, after allowing as an annual operating expense, depreciation and amortization charges sufficient to return to petitioner *all of its actual investment cost* of its plant assets over the remaining estimated life thereof, will provide a return of 7.35 per cent on petitioner's net investment cost of the property employed in the busi-

ness, are unreasonable. It is true that the former owner sold such plant assets to petitioner at a price of $4,905,712.37 less than the depreciated original cost thereof as determined by the commission, and that, under the commission's method of computing future allowable depreciation as an operating expense chargeable to earnings, such $4,905,712.37 of original cost to the former owner will never be recouped out of future earnings of the system. However, it is the former owner and not petitioner who has been prejudiced thereby, not by any action of the commission with respect to allowable depreciation, but by such former owner's voluntary act in selling at a price materially below depreciated original cost."

We respectfully submit that a fare order based, as it is, on the proposition that Suburban should be allowed annual depreciation expense computed on and return related to the number of dollars it actually has invested in the enterprise, cannot be said to be confiscatory or result in the taking of property without due process of law contrary to the Fourteenth Amendment. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591; *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 593; *American Tel. & Tel. Co. v. United States*, 299 U. S. 232. On the basis of these cases we further submit that the decision of the Wisconsin Supreme Court is clearly correct.

(2) *Appellant's contentions are based on erroneous assumptions. Appellant claims constitutional protection for value lost by operation of economic forces. What it desires is an unwarranted windfall at the expense of consumers.*

Suburban, the appellant here, does not challenge the 7.35 per cent return as insufficient or confiscatory as such. Its contention, reduced to its ultimate, comes down to the proposition that it should have an additional $327,047 annually for depreciation expense on top of the $869,868 allowed by the Commission, or a total of $1,196,915. This is based on the theory the annual depreciation charge *should not be,* as allowed by the Commission, an annual amount which will enable Suburban to recoup, over the service life of the property, the $8,966,315.89 actually invsted by it in the enterprise, but rather that such charge *should be* based on the number of dollars ($13,872,028.26) that T. M. E. R. & T. Co., the former owner, had invested in the business. The appellant's claim that net operating revenues ($768,000 allowed for return) will not in fact exceed $441,053 (Appellant's Jurisdictional Statement, pages 5, 12) is arrived at by deducting $327,047 (the alleged deficiency in depreciation expense claimed by appellant) from $768,000 which produces the figure of $440,953, appellant having made an error of $100 in subtraction.

Appellant's claim (Appellant's Jurisdictional Statement, pages 5, 12) that the consequent return will be 2.91 per cent is based on the theory that the amount available for return should be considered to be $440,953 and this figure be related, *not* to the rate base used by the Commission (R. 116) which was arrived at on the basis of the

number of dollars Suburban had invested in the enterprise less depreciation reserve, plus materials and supplies, and working capital ($10,448,639), but rather to a rate base found by using the number of dollars *the predecessor owner,* T. M. E. R. & T. Co., had invested less depreciation reserve, plus materials and supplies, and working capital ($15,189,948). R. 109. The figure of 2.91 per cent which appellant mentions is $15,189,948 divided into $440,948. By way of comparison, using what we submit are the proper figures, based on the number of dollars actually invested by Suburban and a return component allowance of $768,000, the resulting rate of return percentage is 7.35 per cent, instead of 2.91 per cent obtained by Suburban by use of its figures.

There certainly is, we submit, no constitutional requirement that the owner of a business receive a reasonable return on any thing other than *his own investment* in the business. This, as well as the proposition that there is no constitutional requirement that the owner of a business receive by way of an allowance for depreciation expense more than necessary to recoup his actual dollar investment, is, we submit, established by the cases above cited.

In *Federal Power Comm. v. Natural Gas Pipeline Co., supra,* it is said (315 U. S. at 593):

> "* * * When the property is devoted to a business which can exist for only a limited term, any scheme of amortization which will restore the capital investment at the end of the term involves no deprivation of property. * * * The Constitution does not require that the owner who embarks in a wasting-asset busi-

> ness of limited life shall receive at the end more than he has put into it. * * *"

In *Federal Power Comm. v. Hope Natural Gas Co., supra,* it is said (320 U. S. at 606):

> "* * * Moreover, this Court recognized in *Lindheimer v. Illinois Bell Teleph. Co., supra,* the propriety of basing annual depreciation on cost. By such a procedure the utility is made whole and the integrity of its investment maintained. No more is required. We cannot approve the contrary holding of *United Railways Co. v. West,* 280 U. S. 234, 253-254. * * *"

In the instant case the annual amount allowed for depreciation expense by the Public Service Commission will result in Suburban being made whole on *its* actual dollar investment. Also it is allowed a return of 7.35 per cent on a rate base reflecting *its* actual dollar investment. We submit this cannot be said to be confiscatory.

Appellant's contention as to depreciation, if sustained, will permit it additional depreciation expense of $327,047 annually and over the service life of the property will allow it to accumulate not only its actual investment of $8,966,315 but an additional $4,905,712, which in the aggregate equals the $13,872,028.26 investment of T. M. E. R. & T. Co., the prior owner. Allowance of this $4,905,712 would be a windfall for Suburban, exacted by it from its customers by higher fares made necessary to produce additional annual revenues of $327,047. This, we submit, would be incorrect. Certainly the granting of such a windfall is not required by the Constitution. *Federal Power Comm. v. Natural Gas Pipeline Co., supra* (p. 593 of 315 U. S.).

Appellant's suggestion that the Constitution requires hat it be allowed a return on the higher rate base resting n the approximately five million dollar larger investment of T. M. E. R. & T. Co., if accepted, would mean hat a 7.35 per cent return on said rate base ($15,189,948) ould give it $1,116,461 or 10.69 per cent on a rate base f $10,448,639 based on appellant's *actual* investment. Again e say this would be an unwarranted windfall to Subrban at the expense of its customers.

Appellant Suburban also makes the basic but erroneus assumption that the Constitution affords protection for alue lost by operation of economic forces.

In authorizing Suburban to issue securities to buy said roperty, the Wisconsin Commission found, as required y Section 184.06(1), Wis. Stats., it had a value equal o the purchase price of $10,000,000 of which $8,966,315.89 as for the operating property and $1,033,684.11 for other ssets. R. 133, 137. Appellant Suburban accepted the bene- t of this authorization, never appealed therefrom, and annot now challenge this finding. *Federal Power Comm. . Colorado Interstate Gas Co.*, 348 U. S. 492.

The price paid by Suburban was a recognition that ne earning power of the property would not justify a igher price. The Wisconsin Commission found (R. 127):

> "The purchase price of $10,000,000 reflects consideration of probable earning capacity of the passenger transportation system and high depreciation occasioned by obsolescence of street railway lines and certain other property of the transport system."

In reality Suburban is attempting to claim constitutional protection for value lost by operation of economic forces and to restore those lost values by an excessive depreciation charge. The due process clause of the Federal Constitution "* * * has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces." *Market Street R. Co. v. Railroad Comm.*, 324 U. S. 548, 567.

Appellant also assumes (Jurisdictional Statement p. 20) the fact that the properties were sold by T. M. E. R. & T. Co. to Suburban has no significance. This is again an erroneous assumption. Said sale was of the utmost significance. It was the method by which T. M. E. R. & T. Co. withdrew its invested capital from the enterprise and Suburban invested its capital. Such sale established a loss resulting in an income tax benefit for T. M. E. R. & T. Co. in the amount of $4,500,000. Appellant's Jurisdictional Statement p. 7.

Suburban implies (Jurisdictional Statement p. 10) the price paid by it for the properties is only part of the consideration obtained by the seller. The additional consideration was the $4,500,000 income tax saving obtained by T. M. E. R. & T. Co. Not one cent of that represents *any consideration paid or investment made by Suburban.* It represents a reduction in income taxes otherwise payable by T. M. E. R .& T. Co. to the Federal government, which deficit must be made up by the taxpaying public.

(3) *The fares authorized by the fare order of September 17, 1953 here under review have not been in force since at least May 24, 1954, at which date higher fares were authorized in a separate rate proceeding and placed in effect.*

Following issuance of the fare order of September 17, 1953 *here under review,* Suburban instituted a new proceeding for higher fares because of a wage increase and decline in the level of riding. R. 194-195. At its request, temporary rates higher than those authorized by the September 17, 1953 fare order were authorized by the Wisconsin Commission and placed in effect on and after May 24, 1954. R. 181-182. These temporary rates were made permanent by order issued November 5, 1954 (R. 186-198) which also authorized certain other changes. The effect is that the rates prescribed by the order of September 17, 1953 were superseded by higher rates and have not been charged the public since May 24, 1954.

The Supreme Court of Wisconsin held the fact the rates prescribed by the September 1953 order were under review and were thus superseded did not make the proceeding to review the September 1953 order "moot," as held by the trial court, because the Wisconsin Commission employed the same method of computing the allowance for depreciation expense in the proceeding in which the May 1954 temporary fare order was made which culminated in the November 1954 order, as it did in issuing the September 1953 order. Nevertheless, the fact that the order here under review has been superseded by higher fares and hence prescribes fares no longer in effect, has,

we submit, at least the effect of eliminating from the instant case, any substantial federal question.

II.

CERTIORARI SHOULD NOT BE GRANTED.

For reasons stated at pages 3-4, *ante*, we submit that this is not a proper case for writ of error, and that the appeal papers should be regarded and acted upon as a petition for a writ of certiorari. 28 U. S. C. § 2103.

We further submit the cause is not one which warrants review by this court on certiorari. We have presented our argument (pages 8-16, *ante*), why we believe the case presents no susbtantial federal question. We assert that such argument also establishes the lack of any ground for granting a writ of certiorari. None of the grounds for certiorari specified in Rule 19, paragraph 1, here exist. The decision of the Supreme Court of Wisconsin is clearly correct. There is no substantial federal question. The decision below fully accords with the decisions in *Federal Power Comm. v. Hope Natural Gas. Co.*, 320 U. S. 591; *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U. S. 575; and *American Tel. & Tel. Co. v. United States*, 299 U. S. 232.

CONCLUSION

We respectfully submit (1) that appeal is not a proper remedy here, but that appellant should have petitioned for certiorari, and under the circumstances the appeal papers should be regarded as constituting such a petition; (2) that the decision below is correct; (3) the petition for certiorari should be denied; (4) if it is considered the matter is properly before the court on appeal, that no substantial federal question is presented and our motion to dismiss should be granted.

Respectfully submitted,

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September 12, 1955

The City of Milwaukee and Milwaukee Board of School Directors, intervening appellees, hereby join in and adopt the aforesaid motion to dismiss of the appellee Public Service Commission of Wisconsin, including all argument submitted in support thereof.

Respectfully submitted,

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September 12, 1955.

Office - Supreme Court, U.
FILED
OCT 10 1955
HAROLD B. WILLEY, Clerk

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Appeal from the Supreme Court of the State of Wisconsin

REPLY TO APPELLEES' MOTION TO DISMISS

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REPLY TO APPELLEES' MOTION TO DISMISS

As to Jurisdiction

Counsel for the Appellees overlook the fact that this Court has construed the phrase "a statute of any state" in subsection (2) of Section 1257, United States Code, as encompassing a Commission order limiting fares pur-

suant to a state statute. The cases cited at pages 3 and 4 in our Statement as to Jurisdiction sustain this generally.

In *Bluefield Water Works & Improvement Co. v. Public Service Commission,* 262 U.S. 679, this Court denied a motion to dismiss a writ of error although there was no challenge as to the validity of the statutes pursuant to which the challenged Commission order had fixed water rates. It was stated at page 683:

> "Plaintiff in error is a corporation furnishing water to the city of Bluefield, West Virginia, and its inhabitants. September 27, 1920, the Public Service Commission of the State being authorized by statute to fix just and reasonable rates, made its order prescribing rates. In accordance with the laws of the State (§16, c. 15-0, Code of West Virginia) the company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order. The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just compensation and without due process of law and denies it equal protection of the laws. A final judgment was entered denying the company relief and dismissing its petition. The case is here on writ of error.
>
> 1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the State, on the ground of repugnancy to the Federal Constitution.
>
> The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the State. The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the

order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court. The motion to dismiss will be denied."

As to the substantiality of the Federal question

Appellees' statement of the facts and their chronology is so confusing as to necessitate a brief response.

1) Proceeding 2-SB-510 was instituted October 24, 1952 (R. p. 122) for the requisite statutory authority to issue securities of a public service corporation to consummate the proposed purchase by Appellant of its Milwaukee transportation system. A certificate of authority to issue the securities was filed December 15, 1952 (R. pp. 133-136) wherein the Commission explicitly stated (R. p. 132):

> "* * * it is concluded that the necessary *statutory findings* may be made and authority granted *to issue the securities* according to the prayer of the application." (Italics supplied)

The material portion of Section 184.04 of the Wisconsin Statutes reads as follows:

> "No securities shall be issued by any public service corporation otherwise than for money, property or services actually received by it. The amount of money, and *the value of the property* or the services to be so received *shall be:* (a) In case of stock having a par value, *not less than the par value* thereof; (b) in case of stock having no par value, *not less than* the amount specified in the commission's certificate of authority as *the selling price of such stock;* (c) in case of evidences of indebtedness not issued for refunding purposes, such sum as the commission may determine to be a reasonable price, but in any

event *not less than seventy-five per cent of their face value;* (d) in case of evidences of indebtedness issued for refunding purposes, such sum as the commission may determine to be reasonable, but in any event *not less than seventy-five per cent of the face value* thereof plus such proportion of any discount (but *not less than* the amount carried on the books of the corporation) paid or incurred after July 8, 1911, upon the obligations to be refunded, as the unexpired term of the obligations to be refunded bears to the whole term thereof. * * * " (1953 Wisconsin Statutes, page 2397) (Italics supplied)

The Commission authorized the issuance of evidences of indebtedness in the principal amount of $7,000,000 and preferred stock with an aggregate par value of $3,000,000, and found as a fact (R. p. 133):

"4. That, in accordance with the requirements of section 184.06(1) of the Wisconsin Statutes, the passenger transportation properties and materials and supplies to be acquired by Milwaukee & Suburban Transport Corporation from The Milwaukee Electric Railway & Transport Company, is determined to have a value of $10,000,000 as of June 30, 1952, the date of the base purchase price."

It is manifest that the certification on December 15, 1952 that, pursuant to the statutes, the transportation system on June 30, 1952 had *a* value of $10,000,000, i.e. was sufficient to support the securities, was not a Finding that *the* value was or could not exceed $10,000,000.

It was several months later, to-wit, on May 19, 1953, (R. p. 141) and after staff review of the Appellant's records and property, when the same Commission determined (R. p. 139) that as of December 30, 1952, the date of purchase, (a) $8,966,315.89 of the purchase price was assignable to Appellant's plant assets, but (b) the

depreciated original cost, i.e. the remaining service value of Appellant's plant assets was $13,872,028.26. The Chief of the Commission's Accounts and Finance Department testified on June 30, 1953 (R. p. 158) that had this amount been paid for said plant assets, there would have been no acquisition adjustment, i.e. the service value represented the equivalent of their cash value.

Since the finding on December 15, 1952 that the property had a value of $10,000,000 was sufficient for authorizing issuance of the securities, there was no occasion to seek a review or an appeal thereof. As to the order of May 19, 1953, the Commission explicitly specified therein that:

> "5. That the accounting procedures prescribed herein shall be *without prejudice* with respect to the determination of rate base or *depreciation expense* allowable *in a proceeding involving service fares.*" (Italics supplied)

Appellees cite *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492. In that case the Federal Power Commission approved a merger on condition that certain of the losses of one of the merging companies would not be passed on to the customers of the other. After the merger was consummated subject to this condition, the respondent sought to challenge this condition in a rate case, and this Court held it was bound by the condition. Manifestly this *Colorado Interstate Gas* case is not applicable to the instant situation.

2) At page 4 of the Motion to Dismiss, Appellees state:

> "* * * (2) that the depreciated investment in the transportation property involved by T. M. E. R. & T. Co., the original owner, was $13,872,028.26, said figure being the original cost to T. M. E. R. & T.

> Co. of $29,926,800.04 less depreciation reserve requirement of $16,054,771.78; * * * ."

Since the depreciation reserve requirement study was made in respect of Appellant's property after the sale was consummated, incorrect inferences normally would be drawn from this statement.

As noted at page 7 of the Statement as to Jurisdiction, the reserve for depreciation of the original owner and seller as of June 30, 1952 was $11,805,286, and the net property and plant was $18,174,759. (R. p. 127) The Commission in its order of May 19, 1953 determined that this depreciation reserve was inadequate and established the depreciation reserve requirement for Appellant *as of December 30, 1952, the date of purchase,* at $16,054,771.78. In other words, the Commission determined that prior to the sale an economic loss in respect to plant assets had occurred, i.e. depreciation and obsolescence not reflected in the seller's reserve for depreciation in the amount of $4,249,485.78. This occasioned the reduction in the finding as to service value to $13,872,-028.26 and a windfall to the riding public of said $4,-249,485.78. Appellant has never challenged this finding.

The Wisconsin Supreme Court has specifically defined "accrued depreciation" as follows:

> "By accrued depreciation we understand the lessened service value of the plant due to its consumption in furnishing the service for which ratepayers are charged." *Wisconsin Telephone Co. v. Public Service Commission,* 232 Wis. 274, at page 335.

Therefore, since the original cost of the plant assets had been established by the Commission, to-wit, $29,-926,800.04, if the remaining service value had been reduced by economic losses to $8,966,315.89 as now con-

tended, the Commission would have found the depreciation reserve requirement as of December 30, 1952, the date of purchase, was the difference, to-wit, $20,960,-484.15. With full knowledge of all the facts, however, the Commission in proceeding 2-SB-510 determined (R. p. 139) the depreciated original cost of Appellant's plant assets as follows:

Original cost	$29,926,800.04
Depreciation reserve	16,054,771.78
Depreciated original cost	$13,872,028.26

The Commission now impeaches its own finding of service value made in proceeding 2-SB-510.

What the Commission did in the *rate proceeding* was to ignore its own express finding as to the remaining service value, and, without any evidence to support it, *conclusively presumed* that the portion of the purchase price which it assigned to the plant assets, to-wit, $8,-966,315.89, measured the remaining service value. Such a conclusive presumption has been held by this Court to violate the due process provision of the Fourteenth Amendment of the Federal Constitution.

Schlesinger v. State of Wisconsin,
270 U.S. 230 (1926)

Heiner v. Donnan, 285 U.S. 312 (1932)

Commissioner of Internal Revenue v. Clark,
202 Fed. (2d) 94 (7th Cir., 1953)

By this conclusive presumption, and basing the annual depreciation allowance thereon, the Commission effected a confiscation, for the benefit of the public, of the value

of Appellant's plant assets in excess of the purchase price, i.e. the $4,905,712.37 placed in the acquisition adjustment account.

Clearly we have no such situation in this case as obtained in *Market Street Railway Co. v. Railroad Commission,* 324 U.S. 548. There the Market Street Railway Company challenged a reduced valuation fixed by the California Commission. Here Appellant has never challanged the Commission's reduction in the depreciated original cost of its plant assets from $18,174,759 to $13,872,028.26. Appellant here stands upon the Commission's own finding of a service value of $13,872,028.26, the integrity of which the Commission now seeks to impeach. Moreover, in the *Market Street Railway* case the economic loss of value occurred *prior* to the proceeding seeking an increase in fares, and prior increases in fares had produced no increase in operating revenues. Neither of these fact situations obtains in this case.

On page 13 of its Motion to Dismiss, Appellees quote the Commission's reference (R. p. 127) to the fact that the purchase price reflected consideration of probable earnings capacity and high depreciation occasioned by obsolescence of street railway lines. This statement followed immediately the Commission's reference to the fact that the seller, which was also subject to Commission regulation, as of June 30, 1952 had carried its net property and plant at $18,174,759. It was on May 19, 1953, after staff review, that the Commission made its finding that the Appellant's depreciated original cost of the same property and plant was $13,872,028.26. This reduction in service value reflected the high depreciation occasioned by obsolescence *prior to the purchase,* to which the Commission made reference at page 127 of the record herein.

3) On page 15 of Appellees' Motion to Dismiss it is suggested that because the fare structure was modified in part by the Order of November 5, 1954 (R. pp. 186-198), this had the effect of eliminating the substantial Federal question involved. This is an amazing contention in view of the Commission's express confirmation in the November 5, 1954 order that the fares therein specified were fixed to produce net operating revenues of only $770,000 annually as compared to $768,000 in the order of September 17, 1953. (Ap. C, pp. 19-20; R. pp. 192-193) In each Order the Commission's allowance for annual depreciation was computed in the same manner. It is not the fare structure which gives rise to confiscation, but the end result, i.e. the inadequacy of net operating revenues produced by the fares.

The Wisconsin Supreme Court was correct in holding that the issue was not moot but a continuing one. The substantiality of the Federal question as to the allowance of annual depreciation expense has not been affected by the change in the fare structure. In fact the situation is analogous to the situation in *Southern Pacific Terminal v. I. C. C.*, 219 U.S. 498, wherein this Court stated at page 515:

> "But there is a broader consideration. The *questions* involved in the orders of the Interstate Commerce Commission are usually *continuing* (as is manifestly that in the case at bar), and their consideration ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government, and at another time the carriers, *have their rights determined by the Commission without a chance of redress.*" (Italics and parenthetical clause supplied)

4) Appellees in their argument refer to the "basis" for depreciation, to "the return" and to the "rate base" without acknowledging any distinction in these terms. A forecast of net operating revenues may be denominated the return, and its ratio to the net investment in plant assets is a rate of return, i.e. one test of the reasonableness of the anticipated net operating revenues. In *City of St. Francis v. Public Service Commission of Wisconsin,* 270 Wis. 91, at page 93, the Commission was confirmed in its computation of depreciation on the *basis of* original or construction cost of a plant, including donated capital invested in plant assets. Said donated capital, however, was deducted in determining the rate base and no return allowed thereon.

Counsel for Appellees iterate and reiterate that a 7.35% rate of return on Appellant's actual investment is provided for by the Commission order, and that this is not questioned by Appellant on this appeal. It is correct that a rate of return of 7.35% on the actual investment is not challenged on this appeal. However, the question presented is whether, after annual depreciation *properly computed,* the net operating revenue which can be forecast is $768,000 or only $440,953. Appellant claims it is the latter amount, which provides a return of 4.22% on the actual investment and only 2.91% upon the depreciated original cost.

If the entire investment were represented by common stock, then the return on the common stock would be only 4.22%. Counsel for Appellees distort the picture by allocating as return on the small amount invested in common stock the *apparent* net operating revenues in excess of the $526,536 (R. p. 144) required for interest and preferred stock dividends. When the annual depreciation

allowance is properly computed, the net operating revenues of $440,953 allowed by the Commission provide no return on Appellant's common stock and are insufficient to meet Appellant's interest and preferred stock dividend requirements.

5) Appellees on page 11 of the Motion to Dismiss refer to a comment by this court to the effect that there is no constitutional requirement that an owner receive by way of depreciation more than he has put into the property. Construed literally, as Appellees do, this comment assumes, contrary to the fact, that by purchase one cannot acquire title to property having a market or service value greater than the purchase price. Moreover, Appellees also overlook the fact that this case deals with a regulated business. By limiting the fares which a regulated business may charge for transportation service, the Commission thereby limits its earnings, and thus its market value. If one were to accept Appellees' argument that the market value, which is a reflection of anticipated earning power, should be the basis for depreciation, then this would permit the Commission to use a product of its own creation, i.e., depressed earnings, to confiscate service value in property acknowledged to be devoted to rendering public service. Logic as well as constitutional principles require that depreciation be at least sufficient to recoup the service value of plant assets which are devoted to and are being consumed in rendering public service by a regulated company.

CONCLUSION

There is presented an issue as to unlawful confiscation of Appellant's property to the extent that the service value exceeds the purchase price, i.e., $4,905,712.37, which sum was ordered placed in the acquisition adjustment account and also ordered written off as an expense over 15 years. (R. pp. 140-141)

Appellees have disclosed no proper basis for the granting of their Motion to Dismiss, wherefore this Court should deny the Motion, note jurisdiction and direct that briefs on the merits be filed, and the cause scheduled for oral argument.

Respectfully submitted,

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